NG HEE THOONG & ANOR.

v.

PUBLIC BANK BERHAD

COURT OF APPEAL, KUALA LUMPUR
TUAN GOPAL SRI RAM JCA
DATO' SITI NORMA YAAKOB JCA
DATO' MAHADEV SHANKER JCA
[CIVIL APPEAL NO. A-02-33-94]
6 FEBRUARY 1995

PRACTICE & PROCEDURE*: Bank applying for summary judgment on a guarantee agreement - Guarantors claiming they were never served with the letters of demand - Whether guarantors liability predicated upon the making of a demand on them - Whether there was a demand - Trial Court finding in favour of the bank - Appeal against decision - Whether there were triable issues.*

PRACTICE & PROCEDURE *: Application for summary judgment - Delay in taking out application - Affidavit filed in support of application not explaining delay - Counsel explaining delay in address from the Bar - Whether proper - Delay exceeding one year - No service of one month's notice as required by O. 3 r. 6 of the Rules of the High Court 1980 - Whether material.*

The appellants guaranteed a loan advanced by the respondent to one Foo Yik Sdn. Bhd. On default in re-payment, the respondent sent out a letter of demand to each of the appellants. However the letters of demand were not sent to the appellants' addresses given in the guarantee agreements dated 7 January 1981 and 2 August 1984.

Fifteen months after the respondent's default judgment was set aside, the respondent made an application for summary judgment. The appellants argued that they had not been served with the letters of demand, the same argument that had been successfully raised in the application to set aside the judgment in default. The appellants also relied on the respondent's delay exceeding one year since the last proceeding which they said attracted the provisions of O. 3 r. 6 of the Rules of the High Court 1980 (RHC 1980), which requires the service of a month's notice in such circumstances before a plaintiff takes any further step in the action.

The learned Judicial Commissioner did not find favour with the appellants arguments and entered judgment summarily for the respondent. The matter went on appeal.

Held:

[1] There was a clear and unequivocal assertion that there was no demand ever received. The letters of demand were sent to addresses that were different from that appearing on the guarantees. The respondent may well have had a good reason for selecting the addresses appearing on the letters of demand. If it did, then, it must have come out and said so and proffered an explanation. In the absence of any explanation, the affirmative statement made by the appellants upon this critical issue remained unchallenged.

[2] It is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict is usually treated as an admission by him of the fact so asserted.

[3] Applying this principle to the facts of the instant appeal, it may be safely said that the question whether a demand was ever made and received is one that must be resolved at the trial of the action. On the state of the evidence in the present case it is an issue that is manifestly unsuitable for resolution upon a summons for judgment. On this ground alone the appellants ought to have had unconditional leave to defend.

[4] A defendant faced with an application for summary judgment would be entitled to take any and all procedural objections to defeat the plaintiff's summons. In the circumstances of the present case, the appellants were well within their rights to raise and rely upon the non-compliance by the plaintiff of O. 3 r. 6 RHC 1980.

[5] The only reference to the delay point is to be found in the address of Counsel for the respondent in the Court below and the explanation is in reality that of Counsel and not of his client under oath. It is a principle fundamental to our system of adversarial litigation that evidence upon a matter must be given on oath. The practice of Counsel giving evidence from the Bar, as was done in this case, is to be deprecated.

[6] To act, as the learned Judicial Commissioner did in this case is to ignore the very basic tenets of the law of evidence that is applied by our Courts. There was a positive assertion on oath by the appellants that there had been inordinate delay. The proper way in which that was to be met was by way of an affidavit in answer, explaining the delay. Once this is done, then it is up to the judicial arbiter to accept or reject the explanation proffered.

[7] The learned Judicial Commissioner's approach to the question of delay is wrong and against the weight of authority. Faced with the delay and the absence of any admissible evidentiary material before him, the Judicial Commissioner should have refused the respondent's application altogether.

[Appeal allowed. Consequential orders made]

***AMALAN & PROSEDUR**: Bank memohon penghakiman terus atas satu perjanjian gerenti - Penggerenti mengatakan mereka tidak pernah disampaikan dengan surat tuntutan - Sama ada tangunggan penggerenti berdasarkan pembuatan tuntutan ke atas mereka - Sama ada terdapatnya tuntutan - Keputusan Mahkamah perbicaraan memihak kepada bank - Rayuan terhadap keputusan - Sama ada terdapatnya isu-isu yang boleh dibicarakan.*

***AMALAN & PROSEDUR**: Permohonan untuk penghakiman terus - Kelewatan dalam mengeluarkan permohonan - Afidavit difailkan bagi menyokong permohonan tanpa menjelaskan kelewatan - Peguam menerangkan kelewatan dalam ucapan semasa perbicaraan - Sama ada wajar - Kelewatan melebihi satu tahun - Tiada penyampaian notis satu bulan sepertimana yang dikehendaki oleh A. 3 k. 6 Kaedah-Kaedah Mahkamah Tinggi 1980 - Sama ada material.*

Perayu-perayu telah menggerentikan pinjaman yang didahulukan oleh responden kepada Foo Yik Sdn. Bhd. Atas kemungkinan dalam pembayaran balik, responden telah mengirimkan satu surat tuntutan kepada setiap satu perayu tersebut. Walaubagaimanapun surat-surat tersebut telah tidak dikirimkan kepada alamat perayu-perayu yang telah diberikan dalam perjanjian-perjanjian gerenti tersebut bertarikh 7 Januari 1981 dan 2 Ogos 1984.

Lima belas bulan selepas penghakiman ingkar responden diketepikan, responden telah membuat satu permohonan untuk penghakiman terus. Perayu-perayu tersebut telah berhujah bahawa mereka telah tidak disampaikan dengan surat-surat tuntutan, penghujahan sama yang telah ditimbulkan dengan jayanya dalam permohonan untuk mengenepikan penghakiman ingkar. Perayu telah juga bergantung ke atas kelewatan respoden yang melebihi satu tahun

sejak prosiding yang akhir yang mana mereka menyatakan telah melibatkan peruntukan-peruntukan A. 3 k. Kaedah-kaedah Mahkamah Tinggi 1980 (RHC 1980), yang mana memerlukan penyampaian satu bulan notis dalam keadaan sedemikian sebelum plaintif mengambil apa-apa langkah yang selanjutnya dalam tindakan tersebut.

Pesuruhjaya Kehakiman yang bijaksana tidak menyebelahi penghujahan-penghujahan perayu dan memasukan penghakiman secara terus untuk responden. Perkara tersebut telah dikemukakan untuk rayuan.

Diputuskan:

[1] Terdapat penegasan yang jelas dan tidak meragukan bahawa tiada tuntutan yang pernah diterima. Surat-surat tuntutan tersebut telah dihantarkan ke alamat yang berlainan daripada yang terdapat pada gerenti-gerenti tersebut. Responden mungkinnya mempunyai alasan yang wajar kerana memilih alamat-alamat yang terdapat pada surat-surat tuntutan. Jika sedemikian, maka, ianya mestilah menyatakan alasannya dan menawarkan satu penjelasan. Dalam ketiadaan apa-apa penjelasan, kenyataan mengiakan yang dibuat oleh perayu-perayu tersebut ke atas isu yang penting ini kekal tidak dicabar.

[2] Ianya merupakan dasar tetap yang mempengaruhi penilaian keterangan afidavit bahawa di mana satu pihak membuat penegasan yang positif ke atas suatu isu yang material, kegagalan lawannya untuk membantah adalah selalunya dianggapkan sebagai satu pengakuan oleh beliau mengenai fakta yang ditegaskan sedemikian.

[3] Memakai dasar ini pada fakta-fakta rayuan semasa ini, ianya boleh dikatakan bahawa persoalan sama ada satu tuntutan telah pernah dibuat dan diterima adalah sesuatu yang mesti diputuskan di perbicaraan tindakan tersebut. Mengenai kedudukan keterangan dalam kes semasa ini ianya merupakan satu isu yang secara ketaranya tidak sesuai bagi ketetapan atas saman untuk penghakiman. Atas alasan ini sahaja perayu-perayu tersebut seharusnya mendapat kebenaran tanpa bersyarat untuk membela.

[4] Defendan yang dihadapi dengan satu permohonan untuk penghakiman terus akan menjadi berhak untuk menggunakan apa-apa dan kesemua bantahan prosedur untuk mengalahkan saman plaintif. Dalam keadaan kes semasa, perayu berhak untuk menimbulkan dan bergantung atas ketidak-patuhan oleh plaintif terhadap A. 3 k. 6 Kaedah-kaedah Mahkamah Tinggi 1980.

[5] Satu-satu rujukan kepada perkara kelewatan adalah boleh didapati dalam ucapan Peguam bagi pihak responden dalam Mahkamah di bawah dan penjelasan tersebut adalah sebenarnya penjelasan Peguam dan bukannya anak guamnya di atas sumpah. Ianya adalah satu dasar yang penting kepada sistem litigasi berlawanan bahawa keterangan ke atas sesuatu perkara haruslah diberi atas sumpah. Amalan Peguam memberikan keterangan daripada "Bar", sepertimana yang dilakukan dalam kes ini, tidak harus dilakukan.

[6] Untuk bertindak, sepertimana yang dilakukan oleh Pesuruhjaya Kehakiman dalam kes ini adalah tidak menghiraukan rukun-rukun asas undang-undang keterangan yang dipakai oleh Mahkamah-Mahkamah kita. Terdapat penegasan positif atas sumpah oleh perayu bahawa berlakunya kelewatan yang melampau. Cara yang wajar dalam mana perkara itu boleh diatasi adalah melalui afidavit jawapan, menerangkan kelewatan tersebut. Sebaik sahaja ini telah dilakukan, maka ianya adalah terpulang kepada penimbangtara kehakiman untuk menerima atau menolak penerangan yang diberikan.

[7] Pendekatan Pesuruhjaya Kehakiman terhadap persoalan kelewatan adalah salah dan bertentangan dengan autoriti-autoriti. Berhadapan dengan kelewatan tersebut dan ketiadaan apa-apa bahan keterangan yang boleh diterima di hadapannya, Pesuruhjaya Kehakiman seharusnya menolak permohonan responden sepenuhnya.

[Rayuan dibenarkan. Perintah-perintah sampingan telah dibuat]

Cases referred to:
Amanah Merchant Bank Bhd. v. Lim Tow Choon [1994] 2 CLJ 1 ***(refd)***
Alloy Automotive Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd. [1986] 1 MLJ 382 ***(foll)***
China Insurace Co. Ltd. v. Yeong Ah Lan [1973] 2 MLJ 185 ***(refd)***
Overseas Investment Pte. Ltd. v. O'Brien [1988] 3 MLJ 332 ***(foll)***
Syn Lee & Co. Ltd. v. Bank of China [1961] MLJ 87 ***(refd)***
Societe des Etains de Bayas Tudjuh v. Woh Heng Mining Kongsi [1978] 2 MLJ 267 at page 268 ***(refd)***
Malayan Insurance (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd. [1987] 2 MLJ 183, at 185 ***(refd)***
Koh Siak Poo v. Perkayuan OKS Sdn. Bhd. [1989] 3 MLJ 164 ***(refd)***
Bank of British Columbia v. Anglo-American Cedar Products [1985] 57 BCLR 350 ***(cons)***
Eng Mee Yong v. Letchumanan [1979] MLJ ***(refd)***
Bank Negara v. Ismail [1992] 1 MLJ 400 ***(refd)***

Legislation referred to:
Rules of the High Court, 1980 O. 3, r. 6, O.14
Rules of the Supreme Court, 1957 O. 64, r. 13
Rules of Court of the Province of British Columbia, rr. 18, 18A (Canada)

For the appellants - T. Gunaseelan; M/s. A. Zahari Kanapathy Thulasi
For the respondent - Ng Chee Kong; M/s. Ng Chee Kong & Co.

JUDGMENT

Gopal Sri Ram JCA:

We allowed this appeal on 16 January 1995, for the reasons that follow.

The appellants are guarantors of a loan advanced by the respondent to one Foo Yik Sdn. Bhd. (the first defendant in the Court below, and now in liquidation) under two overdraft facilities, the first for RM30,000 bearing interest at the rate of 11% per annum from 1 October 1989, and the second for RM1,150,000 bearing interest at the rate of 11.5% per annum from the same date. The interest is at monthly rests. The guarantee in respect of the first loan is dated 7 January 1981 while that in respect of the second is dated 2 August 1984. Both guarantees give the addresses of the appellants as 83, Jalan Sultan Iskandar, Ipoh. The liability of the appellants under both guarantees is predicated upon the making of a demand upon them by the respondent. Clause 8 in both guarantees reads as follows:

> As to each of us any notice may be served on each of us or on the legal personal representative of each of us either personally or by sending the same through the post in an envelope addressed to the above mentioned address or the last known place of address of the person to be served, and a notice so sent shall be deemed to be served on the day following that on which it was posted.

Default in repayment having occurred, the respondent, on 18 October 1989 sent out a letter of demand to each of the appellants. The letter to the first appellant was addressed to him at 86, Jalan Theatre, Ipoh, while that addressed to the second appellant bore the address 'No. 5, Jalan Chung Ah Moi, Chateau Garden, lpoh'.

The respondent heard nothing from either appellant. So, on 15 November 1989 it issued a writ accompanied by a statement of claim against the borrower and the guarantors and

on 11 January 1990 and 5 June 1990 the respondent obtained judgment against the first and second appellant respectively, for their alleged default in entering an appearance to the writ. On 4 March 1991 the appellants took out a summons to set aside the default judgments entered against them. In paragraph 17 of the affidavit of the second appellant affirmed on 2 March 1991 and filed in support of the summons, the appellants alleged that no demand had been made on them. The question of there having been no demand made in accordance with the terms of the guarantee was therefore squarely raised. On 15 February 1993 the Court set aside the default judgment against each appellant and they then delivered their defence to the action on 25 February 1993.

On 11 May 1994, that is to say, after a lapse of almost fifteen months after the last proceeding in the cause, the respondent took out a summons for judgment. The affidavit supporting the summons gives no explanation for the long delay in making this application. The appellants opposed the summons by way of an affidavit in which they, not surprisingly, asserted that they had not received any demand from the respondent. They also alluded to the fact of the judgment in default having been set aside. The respondent did not file any affidavit in answer to the allegations made by the appellants. In particular, there was no explanation proffered by the respondent for having sent the letters of demand to addresses different from that appearing in the guarantees. Neither was any affirmative proof offered of the letters of demand having been served on the appellants by the rather simple method of exhibiting the A.R. cards as evidence of receipt.

The respondents' summons came on for hearing on 7 July 1994 before Judicial Commissioner Kang Hwee Gee. The appellants argued that they had never been served with the letters of demand. They also submitted that the very same issues as those raised on the summons for judgment had been raised and ventilated at the hearing of the summons to set aside the judgments in default. The appellants also relied on the respondent's delay exceeding one year since the last proceeding which they said attracted the provisions of O. 3 r. 6 of the Rules of the High Court 1980, which requires the service of a month's notice in such circumstances before a plaintiff takes any further step in the action. None of these arguments found favour with the learned Judicial Commissioner. He therefore entered judgment summarily for the respondent against the appellants.

Before us, Encik Gunaseelan who appeared for the appellants repeated and relied on the submissions made in the Court below. I am of the considered opinion that Counsel was correct in his submission that there are plainly triable issues in this case.

In the first place, there is the challenge as to the service of the notices of demand which is a *sine qua non* for the foundation of legal liability under the contracts of guarantee in the present case. As pointed out earlier, there was here a clear and unequivocal assertion that there was no demand ever received. The letters of demand were, as I have already pointed out sent to addresses that were different from that appearing on the guarantees. Additionally, evidence was placed before the learned Judicial Commissioner to show that on 6 June 1989, the respondent had written to the second appellant upon the subject of audit confirmation and this letter bore the address in the contract of guarantee.

The respondent Bank may well have had a good reason for selecting the addresses appearing on the letters of demand. If it did, then, it must have come out and said so and proffered an explanation. In the absence of any explanation, the affirmative statement made by the appellants upon this critical issue remained unchallenged. It is axiomatic that had the respondent either used the addresses stated in the guarantees or had given a credible

explanation as to why those addresses were not used, then it may have been entitled to rely on the deeming effect of clause 8: *Amanah Merchant Bank Bhd. v. Lim Tow Choon* [1994] 2 CLJ 1.

Now, it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict is usually treated as an admission by him of the fact so asserted: *Alloy Automotive Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd.* [1986] 1 MLJ 382; *Overseas Investment Pte. Ltd. v. O'Brien* [1988] 3 MLJ 332.

Applying this principle to the facts of the instant appeal, it may be safely said that the question whether a demand was ever made and received is one that must be resolved at the trial of the action. On the state of the evidence in the present case it is an issue that is manifestly unsuitable for resolution upon a summons for judgment. On this ground alone the appellants ought to have had unconditional leave to defend. I find it quite remarkable that such a vital issue escaped the learned Judicial Commissioner despite a sustained submission made to him in that behalf.

Secondly, there is the delay exceeding one year from the date of the last proceeding in the suit, namely, the delivery of the defence by the appellants after they successfully set aside the default judgments entered against them. In these circumstances the operative provision is O. 3 r. 6 which is in the following terms:

> 6. Where a year or more has elapsed since the last proceeding in a cause or matter, the party who desires to proceed must give to every other party not less than one month's notice of his intention to proceed.
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> A summons on which no order was made is not a proceeding for the purpose of this rule.

In *China Insurance Co. Ltd. v. Yeong Ah Lan* [1973] 2 MLJ 185, the plaintiff gave notice of trial about twenty-three months after the delivery of the defence. The month's notice required by O. 64 r. 13 of the Rules of the Supreme Court 1957, (which is in *pari materia* with O. 3 r. 6 of the present Rules) was not given. The defendant applied to set aside the notice of trial and to have the action dismissed for want of prosecution. The plaintiff did not file any affidavit explaining the delay for giving notice of trial and, in argument, conceded that the month's notice ought to have been given. Syed Othman J, (as he then was) set aside the notice of trial but declined to strike out the action, observing that non-compliance with r. 13 did not render the proceedings void.

Admittedly, *China Insurance (supra)* was a case in which the defendant took the positive step of applying to set aside a step taken by the plaintiff in that case. But I really do not see that that makes any difference in principle. A defendant faced with an application for summary judgment would, in my judgment, be entitled to take any and all procedural objections to defeat the plaintiff's summons. That this is well established practice is recognised in the several editions of the English Supreme Court Practice, commonly called the 'White Book'. Thus, in the present case the appellants were well within their rights to raise and rely upon the non-compliance by the plaintiff of O. 3 r. 6.

The learned Judicial Commissioner dealt with this aspect of the case in the following passage in his judgment:

> The plaintiff was only inactive for 1 year and 3 months and under the circumstances the delay is not inordinate. I accept plaintiff's Counsel contention that there were 4 defendants in this case and that it was necessary for the plaintiff to elect to commence winding up proceedings against the 1st defendant who was the principal debtor to see if it had sufficient assets before commencing proceedings against the guarantors.

> With regard to the failure to give notice under O. 3 r. 6 the irregularity is minor and should be condoned under O. 2 r. 2 since to dismiss this application on such a ground would merely serve to delay the progress of this case.

I have carefully perused the affidavit filed by the respondent in support of its summons for judgment (which is the only affidavit delivered by it) but have been unable to discover any such explanation as that alluded to by the learned Judicial Commissioner. The only reference to the delay point is to be found in the address of Counsel for the respondent in the Court below and the explanation is in reality that of Counsel and not of his client under oath. It is a principle fundamental to our system of adversarial litigation that evidence upon a matter must be given on oath. The practice of Counsel giving evidence from the Bar, as was done in this case, is to be deprecated. To act, as the learned Judicial Commissioner did in this case is to ignore the very basic tenets of the law of evidence that is applied by our Courts. Here was a positive assertion on oath by the appellants that there had been inordinate delay. The proper way in which that was to be met was by way of an affidavit in answer, explaining the delay. Once this is done, then it is up to the judicial arbiter to accept or reject the explanation proffered. But to ride roughshod over such an important point, as was done here, does little to advance the course of justice according to the law.

The effect of O. 14 is to shut the defendant from having his day in the witness box. It is a very special jurisdiction and is only to be invoked in cases where there is no *bona fide* triable issue. On occasions like this it is necessary to recall to mind the words of Judges more learned than I upon the subject at hand.

In *Syn Lee & Co. Ltd. v. Bank of China* [1961] MLJ 87, Thomson CJ (as he then was) explained the summary jurisdiction in words long forgotten by some of those among us who administer the provisions of O. 14. This is how he put it:

> With great respect it seems to me there may have been some slight misapprehension on the part of the Assistant Registrar and on the part of the trial Judge as to the proper approach. **It is not quite the same as the problem with which we are always being faced in the Chancery side of the Court of trying issues on affidavit evidence. In a case of this sort it is not a case of trying the issues on affidavit evidence, it is rather a question of deciding on affidavit evidence whether there is a moral improbability of a very high degree that the defendant can possibly succeed.**
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> On the other hand we have to remember that the Order is there as much in the interests of defendants as in the interests of plaintiffs. It is in the interest of plaintiffs that they should be able to get prompt judgment when there is no real defence. But on the other hand it is in the interest of defendants in such cases that plaintiffs should be able to get judgments not only expeditiously but economically.
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> My own view is so well expressed in the words of Bramwell B. in the case of *Lloyds Banking Co. v. Ogle* that I do not find it necessary to go much further than to quote his words:
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> > The power to sign judgment was, in my opinion, intended to apply to those cases which almost on the admission of the defendant are undefended, and not to cases in which the defendant might reasonably say, "I do not know if your case is well founded or not, but I require you to prove it."
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> Later on his Lordship repeated that last phrase by saying:
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> Where a guarantor *bona fide* says that he does not know that the debt is due, and that he requires it to be proved, I think the statute was not intended to operate to take that right from him. (Emphasis supplied).

The effect of delay in prosecuting a summons for summary judgment was considered by Abdoolcader J, (as he then was) in *Societe des Etains de Bavas Tudjuh v. Woh Heng Mining Kongsi* [1978] 2 MLJ 267 at page 268 where he said:

> The writ in these proceedings was issued on 8 July 1977, and served on 29 July on the defendants who filed their defence and counterclaim on 12 August raising several points of defence and counterclaim, but the plaintiffs only took out their application for summary judgment for the full amount of their claim on 16 August. In *McLardy v. Slateum* the Divisional Court held that, though it was the intention of the rules that the application should be made before a defence had been delivered in ordinary course, the plaintiff was not precluded from making it afterwards, but that in such an event **the onus is cast on the plaintiff of showing why he did not apply sooner.** The plaintiffs in this case have not discharged this onus and indeed Counsel appearing for them admitted this to be so. (The emphasis is mine).

It follows from what Abdoolcader J. has said that whenever there is a delay, it is for the plaintiff in the first place to give an explanation for it in the usual way, that is, by affidavit, even before the point is taken by the other side.

In *Malayan Insurance (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd.* [1987] 2 MLJ 183, at 185, Hashim Yeop A. Sani SCJ (as he then was) explained the basis of the summary jurisdiction in clarity of language that is usually associated with that eminent Judge:

> The underlying philosophy of O. 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to judgment. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases.

In *Koh Siak Poo v. Perkayuan OKS Sdn. Bhd.* [1989] 3 MLJ 164 the same learned Judge, sitting as the Chief Justice of Malaya demarcated the parameters of appellate interference in O. 14 cases. He said (at page 165):

> The approach to be taken by an appellate Court in an O. 14 appeal has been settled. The appeal Court should not regard the appeal as reviewing the exercise of a Judge's discretion but should approach the appeal as a rehearing. This principle was reiterated in *Malayan Insurance (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd.* which referred to *National Company for Foreign Trade v. Kayu Raya Sdn. Bhd.* following *European Asian Bank v. Punjab and Sind Bank* at p.516.

It is important to bear in mind that O. 14 is a summary judgment procedure and not a summary trial procedure. The distinction is well brought out in *Bank of British Columbia v. Anglo-American Cedar Products* [1985] 57 BCLR 350, a decision at first instance of the Supreme Court of British Columbia. There are provisions in the Rules of Court of that Province for both summary judgment and summary trial. Our O. 14 is in *pari materia* with their r. 18, while their r. 18A provides for summary trial. Macdonald J, explained the difference in approach to be adopted in respect of each procedure as follows:

> The plaintiff applies for summary judgment under rr. 18 and 18A of the Rules of Court. This action is based on a guarantee signed by the defendant on 14 March 1983. The obligation of the principal debtor, Cedar Industries Ltd., exceeds the amount which the guarantor can be called upon to pay.
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> The defence alleges that the guarantee is null and void because the plaintiff is in breach of certain express or implied collateral terms thereto and because it induced the execution thereof by fraudulent or negligent misrepresentations. The plaintiff responds that the form of the

guarantee on which it relies precludes the existence of any collateral terms. It concedes that there may have been such collateral obligations in connection with an earlier guarantee, but that the 14 March 1983 guarantee on which it now sues was a "new deal". The plaintiff denies the misrepresentations alleged.

Were this an application under r. 18 alone, it would be dismissed. Since *Hughes v. Sharp* [1969] 68 WWR 706, 5 DLR (3d) 760 (BCCA), it has been well established that a litigant is not to be deprived of a trial under r. 18 unless it is manifestly clear that he is without a defence that deserves to be tried or that his case discloses no facts which could provide him with a defence. The question, under r. 18, is whether there is a *bona fide* triable issue. That position was reconfirmed in *Memphis Rogues Ltd. v. Skalbania* [1982] 38 BCLR 193 at 202, 29 CPC 105 (CA):

> The question has been stated in a number of ways: Is there no real substantial question to be tried? Is there no dispute as to facts or law which raises a reasonable doubt? Is it manifestly clear that the appellants are without a defence that deserves to be tried? Although cast in different terms, all point to the same inquiry, namely, is there a *bona fide* triable issue?

Under r. 18, the chambers Judge must not try disputed issues of fact or law: *see C.I.B.C. v. Nandhra* [1977] 31 BCLR 242 at 244 (C.A.). Under r. 18A, however, the situation is different. Subrule (3) of r. 18A reads:

> (3) On the hearing of the application, the Court may grant judgment in favour of any party upon an issue or generally, unless
>
> (a) the Court is **unable** on the whole of the evidence before the Court on the application, **to find the facts necessary** to decide the issues of fact or law, or
> (b) the Court is of the opinion that **it would be unjust** to decide the issues on the application ... (the emphasis is mine.)

Rule 18A anticipates the prompt determination of disputed issues of fact or law. It is a summary trial procedure rather than a summary judgment procedure. The Court has a wide discretion under r. 18A. The plaintiff referred to *Yong v. Letchumanan* [1980] AC 331 (P.C.), (the reference here is to *Eng Mee Yong v. Letchumanan* [1979] MLJ) to suggest an approach which should be adopted by a chambers Judge under r. 18A. While that decision is concerned with the removal of a caveat and its facts have no parallel to this case, I agree that the following statement at p. 341 is applicable to these proceedings:

> Although in the normal way it is not appropriate for a Judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit, however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as he "may think just" the Judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient *prima facie* plausibility to merit further investigation as to their truth.

The obligation of the chambers Judge under r. 18A goes even further. If there is some evidence with ***prima facie*** **plausibility** that merits further investigation, there is an obligation under r. 18A to decide the issues of fact or law raised by that evidence unless the Court is unable, on the whole of the evidence before it, to find the facts necessary or unless it would be unjust to decide the issues without a trial. Even though the chambers Judge may not be prepared to decide the issues on the application, those proceedings may serve to clarify the issues and lead to direction under r. 18A (5) designed to expedite the trial.

There is no equivalent of the British Columbian r. 18A in our Rules of the High Court. In my judgment no resort should be had to judicial legislation to fill this lacuna by enlarging the function, of a Court under O. 14. That is a matter for the Rules Committee.

I am conscious of the more robust approach to applications for summary judgment that has been adopted by our Courts more recently. (See: the majority judgment in *Bank Negara v. Ismail* [1992] 1 MLJ 400.) But I think that in the process the cautionary words of Thompson CJ in *Syn Lee (supra)* to which emphasis has been supplied may have been overlooked.

It is my respectful view that the passage in the opinion of Lord Diplock in *Eng Mee Yong (supra)* that was quoted by Macdonald J. in *Bank of British Columbia (supra)* and relied upon by the majority in *Bank Negara (supra)* is entirely irrelevant to an application for summary judgment. Although the majority decision of the Supreme Court may plainly bind us, I cannot escape the feeling that the minority judgment of Gunn Chit Tuan SCJ (later Chief Justice of Malaya) and the approach taken by him truly represents the law. It is neither open to me nor is it my place to say anything more about the rather novel decision in *Bank Negara*, but the time may come when the approach there adopted by the majority may have to be reconsidered by the Federal Court in an appropriate case.

Returning now to the present case, I am of the opinion that the learned Judicial Commissioner's approach to the question of delay is wrong and against the weight of authority. Faced with the delay and the absence of any admissible evidentiary material before him, the Judicial Commissioner should have refused the application altogether.

It is for these reasons that the appeal was allowed and the following orders made:

(1) that the appellants have unconditional leave to defend the action;

(2) that discovery be dispensed with, but with liberty to apply;

(3) that the action be entered for trial within 30 days from 16 January 1995;

(4) that there be an early trial of the suit;

(5) that the costs of this appeal do follow the event of the trial;

(6) that the deposit paid into Court by the appellants be refunded to them.